

TENNESSEE VALLEY AUTHORITY

URGENT PURCHASES

TWENTY-SECOND REPORT

BY THE

COMMITTEE ON GOVERNMENT
OPERATIONS



AUGUST 8, 1962.—Committed to the Committee of the Whole House on
the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., August 8, 1962.

Hon. JOHN McCORMACK,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's 22d report to the 87th Congress. The committee's report is based on a study made by its Executive and Legislative Reorganization Subcommittee.

WILLIAM L. DAWSON, *Chairman.*

LETTER OF TRANSMITTAL

House of Representatives,
Washington, D.C., August 27, 1912.

Hon. John S. Dill, Clerk,
Speaker of the House of Representatives,
Washington, D.C.

Dear Mr. Speaker: By direction of the Committee on Government Operations, I submit herewith the committee's 22d report to the 57th Congress. The committee's report is based on a study made by its Research and Information Subcommittee.

Very respectfully,
William L. Dawson, Chairman.

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Union Calendar No. 889

87TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } No. 2152

TENNESSEE VALLEY AUTHORITY URGENT PURCHASES

AUGUST 8, 1962.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DAWSON, from the Committee on Government Operations,
submitted the following

REPORT

BASED ON A STUDY BY THE EXECUTIVE AND LEGISLATIVE REORGANIZATION SUBCOMMITTEE

On August 8, 1962, the Committee on Government Operations had before it for consideration a report entitled "Tennessee Valley Authority Urgent Purchases." Upon motion made and seconded, the report was approved and adopted as the report of the full committee. The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

One of the prescribed duties of the Committee on Government Operations is to receive and examine reports of the Comptroller General of the United States and to submit such recommendations to the House as it deems necessary or desirable in connection with the subject matter of such reports.

The Government Corporation Control Act (31 U.S.C. 841 et seq.) and the Tennessee Valley Authority Act (16 U.S.C. 831h(b)) require the Comptroller General to audit the Tennessee Valley Authority at least once a year. This report of the committee relates to a subject discussed in the Comptroller General's report on the audit of the Tennessee Valley Authority for fiscal year 1960, submitted in January 1961.

In December of 1959 the Board of Directors of the Tennessee Valley Authority, after consulting its legal counsel,¹ adopted an urgent purchase policy. The purpose of the policy was to fill a need felt by TVA for a procedure to be followed when buying materiel or services which were urgently required, but which the TVA Board did not wish

¹ See printed hearing entitled "Tennessee Valley Authority Urgent Purchases," pp. 31-34.

to classify as emergencies because of a desire to avoid the use of emergency power permitting unadvertised purchases in all but the most dire situations.

By classifying certain purchases as "urgent" and following a practice of giving suppliers some advance notice of the opportunity to submit offers, even though it appears these purchases related to actual emergency procurements exempt under the law from the advertising requirement, the TVA Board acted in consonance with the high traditions of public service and the dedicated management which have characterized TVA from its inception.

The TVA urgent purchase policy was brought to the attention of the Congress by the Comptroller General's report. The committee was of the opinion that a significant question of interpretation of law was raised by the urgent purchase policy. Since the dollar volume of urgent purchases by TVA was comparatively small, the significance of the question arose from the potential danger of the policy's being mistakenly used as a precedent by less circumspect agencies or later TVA Boards for weakening the competitive process.

The Executive and Legislative Reorganization Subcommittee of the House Committee on Government Operations conducted an inquiry into, and a hearing on, the TVA urgent purchase policy. This report covers the findings and results of that inquiry and hearing.

II. BACKGROUND OF REPORT

The original Tennessee Valley Authority Act of 1933 did not specify any procurement procedures to be followed in the purchase of supplies or services (act of May 18, 1933; 48 Stat. 63). This absence of statutory procurement guidelines was changed by the act of August 31, 1935 (49 Stat. 1080), amending the 1933 act, so that now the Authority is required to follow certain specified procedures when purchasing supplies or services (16 U.S.C. 831h(b)).²

The purpose behind requiring adherence to these procedures is twofold. First, they are designed to secure economy in the operation of the Authority by requiring the Authority to purchase its supplies and services in each instance from the lowest qualified bidder. Second, they are designed to prevent favoritism, collusion, or fraud in the award of Government contracts by requiring competitive bids.

To give effect to this twofold purpose the statute states:

All purchases and contracts for supplies or services, except for personal services, made by the corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: * * *

Then, in recognition of the need for flexibility in the operations of the Tennessee Valley Authority, the statute allows certain exceptions to the above requirement. First, it allows the Board to dispense with advertising for competitive bids if an emergency requires immediate delivery of the supplies or performance of the services. Clearly this

² With limited exceptions not pertinent here, the Tennessee Valley Authority is not required to follow the advertising requirements prescribed pursuant to secs. 302 and 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 252, 253). See sec. 602(d)(12) of that act (40 U.S.C. 474(12)).

is a necessary and beneficial exception to the rule, since in an emergency there would not be time for advertising or the submission and opening of bids. Second, the Board may dispense with advertising for competitive bids in the purchase of repair parts, accessories, supplemental equipment, or services for supplies or services previously furnished or contracted for. This exception to the rule is warranted on the ground that it is generally more convenient to procure repair parts, etc., from the original manufacturer or supplier rather than from some other source. The third exception to the general rule requiring advertising for competitive bids pertains to purchases of goods or services costing less than \$500. This exception aims at preventing the competitive bid safeguard from becoming an unnecessary burden by permitting the relatively small purchases to be made without advertising for competitive bids.

No other exception to the requirement of advertising for competitive bids is provided for by the statute. The relevant portion of section 9(b) of the Tennessee Valley Authority Act, as amended (16 U.S.C. 831h(b)), provides:

All purchases and contracts for supplies or services, except for personal services, made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: *Provided*, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed \$500; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among businessmen: *Provided further*, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

In fiscal year 1960, the Board of Directors of the Tennessee Valley Authority promulgated, on advice of legal counsel, an "urgent" purchase policy which permitted the purchasing of supplies or services costing \$5,000 or less without the usual advertising, posting, sealed written bids, or public opening and reading of bids normally followed by the Authority. This policy purported to prescribe a purchase procedure with respect to supplies or services which were urgently needed but which did not involve an emergency under section 9(b) of the act. Thus the policy dealt with purchases which fell somewhere on the spectrum between purchases in the ordinary course of business and true emergency purchases. Since the "urgent" purchase policy appeared to dispense with advertising in those cases to which it was held to apply, a question was raised whether the Authority had created

an unauthorized fourth exception to the requirement of advertising for competitive bids in addition to the three exceptions allowed by the statute.

In its report to the Congress on the audit of the Tennessee Valley Authority, fiscal year 1960, the General Accounting Office opined that the "urgent" purchase procedure was not authorized by the Tennessee Valley Authority Act. The wording of the "urgent" purchase policy was subsequently revised by TVA in 1961, but in substance it remained the same policy which was in effect at the time of the General Accounting Office audit approximately a year earlier.³ The "urgent" purchase policy as revised by the TVA Board on May 11, 1961, stated:

In the following types of purchases, the procurement may be made on the basis of advertising consisting of telegrams, letters, or circulars to prospective bidders (or by telephone calls if there is insufficient time for telegrams, letters, or circulars) in such number and under such conditions as to ensure adequate notice and free and fair competition, but without the requirements that the advertising be for a minimum of one week; that the advertisement be published, made in writing, or posted; or that the bids be sealed, in writing, or read in public:

- a. A purchase at a cost of not more than \$5,000 of supplies or services which are urgently needed but as to which the situation does not constitute an emergency under section 9(b)1 of the TVA Act. (TVA Code, IV Procurement, pp. 2-3, May 11, 1961.)

With reference to the "urgent" purchase policy the Comptroller General's report stated:

We believe that the following principles are fundamental to advertised bidding; namely, (1) an offering to the public, (2) an opportunity for competition, and (3) a basis for exact comparison of bids. Although we recognize that the act gives the Board of Directors discretionary authority to determine the adequacy of the methods and the times of advertising, we do not believe that the procedures instituted by TVA are consistent with the requirements of the TVA Act nor do we believe that the procedures adequately meet the fundamental principles for advertised bidding. (Audit of the Tennessee Valley Authority, fiscal year 1960, p. 45.)

The Committee on Government Operations requested of the Chairman of the Board of Directors of the Tennessee Valley Authority his views and comments on the General Accounting Office audit report. The committee also requested from the General Accounting Office a more detailed opinion on TVA's "urgent" purchase policy. The opinions submitted by TVA and GAO reflected directly opposite conclusions. To enable the committee to determine whether the urgent purchase procedure was consistent with the requirements of the TVA Act, a hearing before the Executive and Legislative Reorganization Subcommittee of the Committee on Government Operations

³ For text of original "urgent" purchase policy, approved Dec. 17, 1959, see app. A, p. 10.

was held on January 25, 1962. At that hearing representatives of TVA and GAO presented their respective views to the subcommittee.

Shortly after the hearing, the TVA Board of Directors eliminated the objectionable feature in its rules.

III. VIEWS OF THE GENERAL ACCOUNTING OFFICE AND THE TENNESSEE VALLEY AUTHORITY

(a) Views of the General Accounting Office

The General Accounting Office was represented at the hearing by Mr. Stephen V. Haycock, Assistant General Counsel, accompanied by Charles E. Eckert, congressional liaison attorney, and John E. Milgate, supervisory accountant.

In his statement to the committee, Mr. Haycock asserted that in the opinion of GAO the urgent purchase policy was not contemplated and is not authorized by the provisions of law which govern procurement by the TVA. Public notice is an essential element of advertising, according to Mr. Haycock, and the urgent purchase policy fails to provide for public notice. The legislative history of section 9(b) of the TVA Act reflects an intention on the part of Congress to dispense with advertising by TVA only in certain specified instances. The urgent purchase policy is not among these.

The portion of section 9(b) of the TVA Act quoted above is the result of a floor amendment to H.R. 8632, 74th Congress. H.R. 8632 initially provided that on and after January 1, 1936, TVA would be subject to laws generally applicable to the obligation and expenditure of Federal funds, which included section 3709, Revised Statutes, the advertising statute. The floor amendment, offered by Representative (now Senator) Lister Hill, of Alabama, was subsequently enacted into law. According to its sponsor, it was "modeled after" section 3709 "with such slight changes as are necessary to meet the special requirements" of TVA.⁴

The only exception to the section 3709 advertising requirement, at the time of the Hill amendment, pertained to emergency purchases. This exception was included in section 9(b) of the TVA Act along with two other exceptions referred to above, namely, the authority to purchase repair parts and supplemental equipment for supplies or services previously purchased, and the authority to make purchases of \$500 or less without advertising. Authority was also given in making awards to consider the factors outlined in the second proviso of section 9(b). These changes, according to testimony of the GAO representative, are the "slight changes" referred to by Representative Hill. In all other cases, advertising, i.e., public notice, is required. Discretion was not granted to the TVA Board to limit notice of an opportunity to bid to the point where it could no longer be considered public notice.

The representatives of GAO added that certain special cases in which the Comptroller General did not take exception to unadvertised purchases to which section 3709 was applicable should not be used by TVA as precedent for the establishment of a general policy. These cases, few in number, were decided by the Comptroller General on an ad hoc, after-the-fact basis. In each instance the Comptroller General

⁴For the language of sec. 3709 in effect at the time of the Hill amendment, see app. B, p. 11.

was confronted with a completed transaction. In such cases the benefit to the Government of taking an exception was overbalanced by the inconvenience or impracticability involved. These ad hoc decisions, therefore, were not intended by the Comptroller General to serve as a basis for the adoption of a general policy by an agency of the Federal Government.

(b) *Views of the Tennessee Valley Authority*

TVA was represented at the hearing by Mr. Robert H. Marquis, Solicitor, accompanied by Mr. Paul Fahey, Director of Materials. Gen. Herbert D. Vogel, Chairman of the TVA Board of Directors, also participated.

Mr. Marquis argued that since section 9(b) of the TVA Act clearly authorized unadvertised emergency purchases, purchases made under the "urgent" purchase policy, all of which were actually emergency purchases, could not be rendered illegal by the use of some advertising. It was also noted that the dollar volume of "urgent" purchases was small compared to total TVA purchases.

The legislative history of section 9(b) of the TVA Act was also discussed at length by the TVA representative. It was argued that the statements of Representative Hill during the 1935 debate prior to adoption of his amendment to section 9(b) prove that it is within the discretion of the TVA Board to extend or restrict, as it sees fit, notice of an opportunity to bid.

It was also argued on behalf of TVA that opinions of the Comptroller General sanctioned the practice of making purchases after giving only a very limited notice of the opportunity to bid.

IV. THE COMMITTEE'S ANALYSIS AND CONCLUSION

The chief argument advanced by TVA's legal counsel in justification of the "urgent" purchase policy was that since the urgent purchases were actually emergency purchases, and since the statute does not require advertising for the latter, the urgent purchases could not be rendered illegal simply because TVA has prescribed, under its urgent purchase policy, that some advertising be used. The General Accounting Office tended to support the contention that the purchases which had actually been made under the policy could be classified properly as emergency purchases. This very argument, however, reveals both the inconsistency and potential danger of the TVA urgent purchase policy statement. That policy clearly stated that it should apply only to nonemergency situations. It was to apply in the event of—

- a. A purchase at a cost of not more than \$5,000 of supplies or services which are urgently needed but as to which the situation does not constitute an emergency under section 9(b)1 of the TVA Act.

Clearly, a policy which explicitly applies only to nonemergency situations may not be justified by reference to emergency authority.

The argument advanced by TVA's legal counsel with respect to the Board's discretion to determine what shall constitute advertising is

also considered unpersuasive. "Advertising" is a generic term. An essential element of advertising is public notice.⁵

In *Purcell Envelope Company v. United States* (51 C. Cls. 211-14), the Court of Claims stated:

* * * This court has held, except in certain cases of exigency, that all contracts between individuals and the Government are void unless they are made upon advertisements for proposals previously published, and that a compliance with such statutes is a condition precedent, upon the performance of which only can a binding contract with the Government be made by its officers.

If the notice is not available to the public generally, it is merely a private communication. The telephone calls, telegrams, letters, and circulars provided for by TVA's urgent purchase policy, are inherently private communications. The TVA Board may not elevate them to the status of advertising by merely denominating them as such. This is contrary to all accepted definitions of the term "advertising."

The assertion by TVA's legal counsel that authority for the Board to decide what shall constitute advertising may be found in the legislative history of section 9(b) is based on a misinterpretation of that history. Such an interpretation would nullify the Hill amendment. As noted above, "advertising" is a generic term and there is nothing in the history of section 9(b) to indicate an intention of the part of Congress to use the term in any other than its generic sense. TVA has contended, in effect, that the Hill amendment made no change in the TVA law. This does not do justice to the efforts of Representative Hill. As pointed out above, prior to the enactment of the Hill amendment there was no statutory procurement law for TVA. The Hill amendment filled this gap. Obviously the amendment was not intended to be a vain thing having no effect. The once largely unrestricted purchasing practices of TVA became subject to the advertising requirements of section 9(b).

Further, to permit the establishment of a TVA purchasing policy which dispenses with advertising for nonemergency purchases sets an undesirable precedent which could serve as a basis for future abuses. If TVA were allowed to continue its policy of unadvertised, non-emergency purchases of \$5,000 or less, it could, in the future, prescribe the same procedure for purchases of \$50,000 or \$100,000. Clearly this was not contemplated by Congress in the enactment of the Hill amendment.

⁵ Webster's New International Dictionary, 2d edition unabridged:

Advertise. To give public notice of; to announce publicly, especially by a printed notice; as to advertise a sale; hence to call public attention to, especially by emphasizing desirable qualities in order to arouse a desire to purchase, invest, patronize, or the like.

Advertising. Any form of public announcement intended to aid directly or indirectly in the sale of a commodity, etc.

Advertisement. A public notice, especially in some public print.

Ballentine's Law Dictionary:

Advertise. To give public notice of; to announce publicly; especially by a printed notice (Webster's International Dictionary). See *Montford v. Allen*, 111 Ga. 18, 19.

Advertisement. A notice published in handbills or a newspaper. 2 C.J. 294. The word also includes notice by posting or display on signboards. *Id.* The idea underlying the word has reference not so much to the vehicle or instrumentality used for getting the notice before the public, as to the diffusion, or bringing home to the public of the information or matter contained in the notice. See *People v. McKean*, 76 Cal. App. 114, 243 Pac. 898.

In addition to the above, TVA's practice of accepting oral bids ignores the statutory language pertaining to the opening of bids. Section 9(b) of the TVA Act provides in part:

All purchases and contracts for supplies or services, made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in *advance of opening bids*, as the Board shall determine to be adequate to insure notice and opportunity for competition. [Emphasis added.]

To be opened a bid must be in some form of writing.

While it might be argued on behalf of TVA that the receiving of oral bids by either telephone or face-to-face communication constitutes a constructive opening of bids, this is an unwarranted construction in view of the plain meaning of the term "opening [of] bids." The statutory language contemplates the receipt of several bids followed by their opening at the same time. This may be accomplished only by the use of written bids.

The decision of the Comptroller General in 22 Comp. Gen. 817, accepting purchase orders based on oral quotations, does not change the general rule. The facts of that case occurred during World War II. Veterans' Administration hospitals experienced food shortages due to the reluctance of suppliers to subscribe in advance to written agreements because of wartime conditions. The Comptroller General held that in view of the national emergency and its effect upon the market, no exception would be taken to the acceptance of oral bids as long as "present emergency conditions continue to exist." He cautioned, however, that written quotations should be obtained where practicable. An ad hoc decision of the Comptroller General, which by its explicit terms applies only to the peculiar facts of a particular case, is not an appropriate precedent for the establishment of a general policy by TVA.

Following discussion at the hearing with respect to both those decisions of the Comptroller General which accepted purchase orders based on oral bids and those which did not take exception to purchases made after very limited notice of the opportunity to bid: Mr. Eckert of the GAO commented:

Mr. ECKERT. If I may interject here, I think this is the point we tried to make with Mr. Brown this morning. We reach many of these irregularities on an after-the-fact basis; that is, after the procurement has been accomplished. Then we must decide whether the Government's interest is best served by requiring a cancellation of the contract or by passing the individual item and admonishing the agency and in many cases reporting the irregularity to the Congress.

We do not originally go out and make the rules and say to the agency; "Now you must conform to this." This is an administrative matter. It may well be that we have passed many items that we didn't feel justified requiring a contract cancellation which might result in damage claims against the Government. However, we are required to notify Congress when we think procedures are being incorporated or adopted which will require or possibly authorize illegal payments.

In summary, the committee believes that the ordinary established meanings of the terms "advertising" and "opening bids" represent what the Congress intended by these terms in enacting the Hill amendment. Hence, a policy or practice which legal counsel for the Tennessee Valley Authority seeks to justify solely on the basis of a departure from those ordinary established meanings would be contrary to the intent of the Hill amendment and thus without authority in law.

V. ACTION TAKEN BY THE TENNESSEE VALLEY AUTHORITY AS A RESULT OF HEARINGS AND INVESTIGATION

As a result of the hearing of January 25, 1962, the committee was informed on February 26, 1962, that the TVA Board of Directors, by appropriate resolution, had abandoned its "urgent," nonemergency purchasing policy, the language of which appears on page 4, *supra*. The resolution of the Board appears below along with the new statement of policy:

Resolved, That the statement of policy contained in the TVA Code entitled "Procurement of Personal Property and of Services," as set out in exhibit 5-11-611, approved by the Board on May 11, 1961, minute entry 848-27, is hereby amended by revising subparagraph a, under paragraph numbered 2, on page 2 thereof to read:

- a. A purchase at a cost of not more than \$5,000 of supplies or services which are urgently needed due to an emergency situation which is not of such immediacy as to require the complete elimination of advertising.

The committee commends the Board for acting promptly after the hearing to eliminate from its rules the objectionable feature.

APPENDIXES

APPENDIX A—ORIGINAL TENNESSEE VALLEY AUTHORITY URGENT PURCHASE POLICY STATEMENT (TENNESSEE VALLEY AUTHORITY BOARD OF DIRECTORS MEETING OF DEC. 17, 1959)

REVISED POLICY STATEMENT—PROCUREMENT OF PERSONAL PROPERTY AND OF SERVICES

The Board adopted the following resolution:

"Resolved, That the policy statement approved by the Board on March 27, 1958 (minute entry 790-9), as amended by the Board on July 24, 1958 (minute entry 795-8), and on July 9, 1959 (minute entry 809-2), and which is contained in the TVA Code entitled "Procurement of Personal Property and of Services," a copy of which is filed with the records of the Board as exhibit 3-27-58a, be and hereby is further amended by revising the first two sentences in the fourth paragraph on page 1 thereof to read as follows:

"Except as provided hereinafter, advertisement is by notices in newspapers or magazines; or by telegrams, circulars, bulletins, or letters sent to vendors and posted in public places. A minimum of 1 week is required for advertising, except that a minimum of 3 weeks' advertising is required for generators, turbines, and similar major items of equipment, and for heavy field construction (additional time may be allowed when deemed desirable); and except as provided hereinafter."

and by inserting the following new paragraph after the fourth full paragraph on page 3 thereof:

"A partial exception to the foregoing policies is made also with respect to supplies or services costing not more than \$5,000 which are urgently needed but as to which the situation does not constitute an emergency under section 9(b)(1) of the TVA Act. In these circumstances the procurement may be made under such advertising and under such conditions as insure adequate notice to the sources of supply and free and fair competition, without the requirements that the advertising be for a minimum of 1 week, that the advertisement be published, made in writing or posted, or that the bids be sealed, in writing, or read in public."

provided, that purchases made under this exception shall be reported quarterly to the General Manager; and be it further

"Resolved, That except as modified by the foregoing paragraphs and the Board resolutions of July 24, 1958 (minute entry 795-8), and July 9, 1959 (minute entry 809-2), the provisions of the resolution of March 27, 1958 (minute entry 790-9), shall remain in full force and effect."

APPENDIX B—PRIOR TEXT OF SECTION 3709, REVISED STATUTES OF THE UNITED STATES (AS OF AUG. 31, 1935, AMENDMENT TO SEC. 9 OF THE TENNESSEE VALLEY AUTHORITY ACT)

All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

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